Supreme Court, U.S.
FILED

JUL 6 1999

OFFICE OF THE CLERK

No. '99 58

In The

Supreme Court of the United States

October Term, 1999

JACK HAWKINS, individually and as President of the Denver Area Labor Federation and PETE VRIESENGA, individually and as President of Denver Musicians Association,

Petitioners,

vs.

CITY AND COUNTY OF DENVER, GARY LANE, Director of the Denver Theaters and Arenas, BROOK NICHOLS, Assistant Building Manager of the Denver Theaters and Arenas and DAVID MICHAUD, as Chief of the Denver Police Department,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

PAUL BENDER, Esq.
Of Counsel
College of Law
Arizona State University
Tempe, AZ 85287
(505) 842-9960

NEIL D. O'TOOLE, Esq.
Counsel of Record
JOHN A. SBARBARO, Esq.
Law Office of Neil O'Toole, P.C.
226 West Twelfth Avenue
Denver, CO 80204-3625
(303) 595-4777

Attorneys for Petitioners

9288

QUESTIONS PRESENTED

Petitioners, classical musicians who have supplied the music for productions of the Colorado Ballet, sought to express their disagreement with the Ballet's decision to terminate their services and substitute tape-recorded music for live performance in upcoming Ballet productions. Petitioners wished to present their views to Ballet patrons by distributing leaflets before and after performances outside the Ballet's theater. That theater is located within the Denver Performing Arts Complex, a tax payer funded and publicly-owned area containing several theaters, other arts venues, restaurants, a retail store, and a parking garage. The area immediately outside the theater, where petitioners wished to leaflet, is a glass covered open air pedestrian walkway, named the Galleria, which formerly had been a city street. The Galleria serves as the only access to the Art Complex's theaters, art venues and restaurants. It remains open to the public 24 hours a day as a pedestrian thoroughfare between adjoining streets. Designating this public thoroughfare as "private property" the city imposed an absolute ban on leafletting and activity within the Galleria and applied it to Petitioners. The questions presented are:

1. Whether the Galleria is a public forum and, if so, whether the city's absolute ban on leafletting within it is constitutional as applied to petitioners;

2. Whether, if the Galleria is not a public forum, the city's total prohibition of leafletting within the Galleria constitutes an unreasonable, and therefore, unconstitutional, regulation of expressive activity as applied to petitioners; and

3. Whether the absolute ban on leafletting within the Galleria, coupled with the city's distribution within the Galleria of promotional material for Galleria events, constitutes unconstitutional viewpoint discrimination as applied to petitioners.

LISTING OF PARTIES TO THE PROCEEDING

The parties in the proceeding below appear in the caption.

TABLE OF CONTENTS

Page

Questions Presented i

Listing of Parties to the Proceeding iii

Table of Contents iv

Table of Cited Authorities ..... v, vi

Opinion Below 1

Jurisdiction 1

Constitutional Provision and Regulations Involved 1

Statement 3

Reasons For Granting The Petition 10

I. Introduction 10

II. The Decision Below Is Incorrect 11

III. The Decision Below Conflicts With Other Circuits 17

IV. This Court's Forum Doctrine Must Be Applied To Protect First Amendment Rights In A Changing Society 19

Conclusion 21

TABLE OF CITED AUTHORITIES

Page

Brd. of Airport Com'rs. Of Los Angeles v. Jews for Jesus,
482 U.S. 569 (1987) 14

Chicago ACORN v. Metropolitan Pier and Exposition Auth.,
150 F.3d 695 (7th Cir. 1998) 18-20

City of Ladue v. Gilleo,
512 U.S. 43 (1994) 14

City of Lakewood v. Plain Dealer Publishing Co.,
486 U.S. 750 (1988) 14

Gerritsen v. City of Los Angeles,
994 F.2d 570 (9th Cir. 1993) 18

International Soc. for Krishna Consciousness, Inc., v. Lee,
505 U.S. 672 (1992) 9, 11, 12, 14-17, 19, 20

Jews for Jesus, Inc., v. Massachusetts Bay Transp. Auth.,
984 F.2d 1319 (1st Cir. 1993) 18

Madsen v. Woman's Health Clinic,
572 U.S. 753 (1994) 14

Martin v. City of Struthers,
319 U.S. 141 (1943) 17

Paulsen v. County of Nassau,
925 F.2d 65 (2nd Cir. 1991) 18

Schenck v. Pro-Choice Network of W. N.Y.,
519 U.S. 357 (1997) 13

Page

Statutes Cited:

28 U.S.C. §1254(1) 1

42 U.S.C. §1983 6

United States Constitution Cited:

First Amendment 1, 11, 13, 14, 16

Jack Hawkins and Pete Vriesenga respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals is reported at 170 F.3d 1281 and is reproduced at Appendix A.1. The oral opinion of the district court is unreported and is reproduced at Appendix A.3. The judgment of the District Court is unreported and is reproduced at Appendix A.2.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 1999. Appendix A.1. A timely petition for rehearing was denied on April 6, 1999. Appendix B. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION AND REGULATIONS INVOLVED

1. The First Amendment to the Constitution of the United States provides, in relevant part:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble . . . .

2. The written policy of the City and County of Denver, applicable to the Denver Performing Arts Complex, provides, in relevant part:

City & County of Denver
Policy And Procedures
Private Property and The Use Thereof

All facilities managed by the Division of Theatres and Arenas are owned by the City & County of Denver and considered "private property." Specifically, these facilities are McNichols Sports Arena, Red Rocks Amphitheatre, the Denver Coliseum, Colorado Convention Center, Currigan Hall, Boettcher Concert Hall, the Temple Hoyne Buell Theatre, and the Auditorium Theatre.

Theatres & Arenas rents the facilities mentioned above to various tenants. This arrangement is made by a rental agreement, a legal document. As such, any activities that occur inside and outside of the leased premises are regulated.

Because these facilities are considered private property, it is important to understand that each facility has a property line as indicated on the attached map(s). All activities within the property line must confirm to the applicable laws, rules, regulations, and ordinances that pertain to such premises.

Some rules that apply are:

- Posting of handbills, flyers, notices, and propaganda are not allowed in parking areas or private property without the express consent of the Facility Manager of Denver, and at times, the Tenant.

- Demonstrations, speeches, and other acts creating or intending to attract a public forum are prohibited within the boundaries of the private property line. Public forum activity is allowed on the designated public right of ways immediately adjacent to the private property lines.

- Parking must occur in designated parking spaces only. Parking fees must be paid, and parkers are subject to the terms and condition as noted on the front of the parking coupon.

- Sales of tickets, foods, t-shirts, novelties, or any items without express permission of the Facility Manager is strictly prohibited.

The applicable constitutional provision and City and County of Denver Regulations are reproduced at Appendix C.

STATEMENT

1. Petitioners are representatives of the classical musicians who have, for many years, performed live music for productions of the Colorado Ballet. Appendix A.1., p. 2a. Those productions take place in Denver's Temple Hoyne Buell Theater, which is part of the Denver Performing Arts Complex ("Complex"). The tax payer funded Complex is owned and operated by the City and County of Denver. *Id.*

In September, 1997, the Artistic Director of the Colorado Ballet informed the President of the Denver Musicians Association that the Ballet had decided not to use a live orchestra at upcoming performances of Tchaikovsky's "Romeo and Juliet"

ballet, but instead would use a tape recording of the musical score. *Id.*, p. 4a. Petitioners notified the appropriate Denver officials that they intended to protest this decision by distributing leaflets to ballet patrons at the opening performance of "Romeo and Juliet" on October 11, 1997. A Denver official responded with a written memo stating that leafletting was absolutely prohibited within the Performing Arts Complex. *Id.*

2. At the opening night performance of "Romeo and Juliet," a group of musicians, dressed in their formal performance clothes, began to picket and to distribute leaflets protesting the decision not to use live musicians. Appendix D. 1., D. 2. (photos of musicians leafletting). The leafletting took place just outside the Temple Hoyne Buell Theater, (where the ballet was being performed), in the "Galleria," a partially enclosed street within the Complex, which serves as the only access to the Complex's theaters and other facilities. Appendix A.1., pp. 22a-23a (detailed map of the Performing Arts Complex).

The Galleria had been an ordinary public street (Curtis Street) open to pedestrian and vehicular traffic prior to the formation of the Complex. *Id.*, p. 10a. As described in the court of appeals' opinion, it is now "an open air, glass-covered pedestrian walkway approximately 600 feet long, with a width ranging between 32 and 40 feet." *Id.*, p. 3a.; *see also* Appendices D.3., D.4., D.5. (photos of the Galleria taken from Speer Blvd., inside in the direction of Fourteenth Street and inside from Fourteenth Street.) Both ends of the Galleria permit entry by the public, unrestricted by gates or doors. *Id.*

On one side of the Galleria are two large theaters — the theater in which the ballet performs and the Auditorium Theater, a multi-functional arts venue for plays, musicals, and concerts. On the other side are a third theater used also for plays, and a

public parking garage. At one end, the Galleria intersects with Denver's Fourteenth Street; at the other end are several additional performing arts venues, an open-air sculpture park and access to Denver's Speer Boulevard. Appendix A.1., pp. 22a – 23a. The Galleria contains two cafes and a retail store selling merchandise relating to performances at the Complex. *Id.* The total capacity of all the Galleria's theaters is 9300. *Id.*, p. 3a. A large number of the patrons for any particular Galleria event arrive by automobile and park in the Complex's garage. The only way to distribute leaflets to these patrons is from a place within the Galleria. *Id.*, pp. 22a – 23a.

The Galleria is open 24 hours a day to pedestrian, but not vehicular traffic. *Id.*, p. 10a.; Appendix D.3. (photos of pedestrian traffic). It is open to all members of the public, not just those patronizing one of the theaters, arts venues or businesses within the Complex. *Id.* The Galleria serves as a through pedestrian walkway between Fourteenth Street and Speer Boulevard. Within the Galleria, the city distributes brochures promoting events at the Complex and other city-owned venues, such as the McNichols Sports Arena, where the Denver Nuggets (basketball) and Colorado Avalanche (hockey) play. Businesses leasing space in the Galleria are permitted to post advertising signs within it and automobile dealerships are permitted to park a trucks, or cars, in the Galleria for advertising purposes during and around scheduled performances. *Id.*, p. 4a; Appendix D.5. (photo of 1998 Lincoln automobile in the Galleria).

3. The leaflet that the musicians distributed to patrons on the opening night of the ballet featured the message "Romeo and Juliet — Full price for half the show." (The language of the leaflet is produced in FN3 of the Court of Appeals Opinion. Appendix A.1., 20a.) It stated that the artistic director of the ballet had "decided to fire the entire orchestra and replace them with taped (jukebox) music. The only problem is,

he did not tell you this before you paid full price for your ticket." It went on to tell patrons that "[y]ou are entitled to a refund, or at least, a raincheck for a performance that has a complete product for which you have paid." The leaflet gave the name and telephone number of the CEO of the Colorado Ballet and encouraged patrons to "voice your opinion." Appendix A.1., p. 20a.

4. During the musicians' leafletting on the opening night of "Romeo and Juliet," a Denver official told them that their activity was prohibited. The official demanded that the musicians leave. Police were summoned and warned the musicians that if they continued to distribute leaflets within the Galleria they would be arrested. *Id.*, p. 5a. The next night musicians returned to the Galleria but were removed by police. *Id.* On the following day, a Denver Deputy City Attorney sent one of the petitioners a letter stating that leafletting was not allowed within the Galleria. *Id.* Subsequently, police removed the protesting musicians "from all [Performing Arts Complex] facilities," instructing them to confine their activities to public streets outside the Complex. *Id.* The City conceded that none of the musicians' activities within the Galleria caused safety or congestion problems, or disruption of activities, within the Complex. *Id*, p. 17a.

5. In early November, 1997, petitioners notified Denver officials that they intended to distribute leaflets at taped-music performances of "The Nutcracker" scheduled for the Christmas season. *Id.*, p. 5a. They received no response. *Id.* On November 24, 1997, petitioners filed a complaint in district court under 42 U.S.C. §1983 seeking preliminary and permanent injunctive relief against the city's interference with their leafletting activities within the Galleria. *Id.*, pp. 5a – 6a.

The district court conducted a one-day consolidated

hearing, at the end of which it ruled orally that the Galleria was not a public forum and that the city's total ban on leafletting within it was reasonable. *Id.*, p. 6a. The District Court reasoned:

> [I]f this were determined to be a public area, there would be homeless individuals or street people, I would assume, who elect to use that area; there would be vendors of all types and descriptions who have a right in a public area to vend their wares; individuals such as the ones one sees on our 16th Street Mall for handouts; speeches given by different individuals espousing their particular positions, all of which would clearly, in the city's opinion at the time disrupt the use of the venues by the lessees and their patrons, the individuals who are there for their entertainment, and otherwise. At this time it was determined that the only handouts that would be allowed were those earlier discussed.

Appendix A.3., pp. 33a – 34a.

The district court denied petitioners' injunctive requests and dismissed petitioners' claim on the merits. *Id.*; Appendices A.2., A.3.

6. The court of appeals affirmed. It expressly treated petitioners' injunctive request as an "as applied" challenge to the city's absolute prohibition of leafletting in the Galleria: "The record indicates that [petitioners] planned to demonstrate in the Galleria for approximately one hour before the performance of 'Romeo and Juliet' and about ten minutes after. They intend to stage similar demonstrations at performances of 'The Nutcracker.'" The court therefore considered the city's application of the speech restriction only as it applied "during times just before and after performances." Appendix A.1., p. 16a. The court also considered petitioners' challenge in light of the admission by the city "that [petitioners]

did not cause any congestion problems or major disruption on the particular occasion that they demonstrated within the Galleria." *Id.*, p. 17a.

The court of appeals nevertheless affirmed the dismissal of petitioners' complaint.

a. The court held that first the Galleria "is a nonpublic forum." *Id.*, p. 10a. In the court's view, the Galleria did not "qualify as a traditional public forum" because "it is not a park, nor is it analogous to a public right of way or thoroughfare" since "it is closed to vehicles, and pedestrians do not generally use it as a throughway to another destination." *Id.* The facts that the Galleria is generally open to the public and that it was constructed on what used to be a public street do not make it a public forum because "the government may, by changing the physical nature of its property, alter it to such an extent that it no longer retains its public forum status." *Id.* (citations omitted).

Nor, in the court's view, does the Galleria "qualify as a designated public forum" in view of the city's "consistent practice of not allowing . . . leafletting in the Galleria." *Id.*, p. 11a. The fact that Denver allows advertising and promotional leaflets in the Galleria does not make it a designated public forum because the permitted speech "is limited to advertising by [Performing Arts Complex] tenants and publications promoting events taking place in city owned and operated facilities." *Id.*, p. 12a. (This finding is incorrect, since the court of appeals itself acknowledged that auto dealerships advertised in the Galleria, and the record showed that promotional literature contained advertisements for non-tenants.)

b. The court next decided that Denver's speech policy is "viewpoint-neutral" as applied to petitioners, despite the fact that ballet patrons "receive positive commentary about the ballet in the promotional type materials available in the Galleria" while petitioners are unable "to criticize the ballet in their chosen manner." *Id.*, p. 13a. "Denying the plaintiffs the opportunity to rebut all messages does not amount to unlawful viewpoint discrimination." *Id.*

c. The court then sought to apply the reasonableness standard utilized by Justice O'Connor's determinative opinion in *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992) ("*Lee*"). As a preliminary matter, the court noted that *Lee* "has created some confusion as to the level of scrutiny applied under the reasonableness test," and that the "factually-intensive, individualized inquiry" required by that opinion "leaves unclear whether the right to leaflet found in *Lee* would extend to the Galleria." *Id.*, p. 15a.

Applying *Lee*, the court held that "the physical characteristics of the Galleria distinguished it from the airports in *Lee*," because the commercial establishments within the Galleria "do not compare in number or variety to those found within airports," (*id.*) and because, "unlike airports . . . the Galleria is a comparatively narrow corridor." *Id.*, p. 16a. The court then held that the applicable reasonableness test was "***whether [petitioners'] proposed use could have conceivably run afoul of the city's interest in preserving the forum for its intended use.***" *Id.*, p. 17a (emphasis added). The court believed this test was satisfied for two reasons. First, despite the city's admission that petitioners had in fact caused no "congestion problems or major disruption," (*id.*, p. 17a), petitioners' activities "***could*** cause some obstruction" at the "peak traffic flow" times during which

petitioners sought to leaflet. *Id.* (emphasis added). Secondly, "allowing groups . . . to leaflet and express themselves before and after performances invites a host of additional expressive activity at odds with the [Performing Arts Complex's] limited purpose as an entertainment venue . . . . Such activity ***could*** seriously disrupt the ability of the Galleria to serve its designated functions . . . [as] a safe and comfortable environment for [Complex] events." *Id.*, p. 18a (emphasis added). The court of appeals concluded that there was "nothing unreasonable in Denver's decision to keep the Galleria area clear of leafletters and protestors during its peak times." *Id.*

REASONS FOR GRANTING THE PETITION

I. INTRODUCTION

Petitioner musicians in this case sought to exercise their constitutional right to peacefully protest the Colorado Ballet's decision to dispense with live music at future Ballet performances. They sought to do so at the most appropriate time and place for such a protest — the Galleria public space immediately outside the Ballet's theater before and just after ballet performances.

Petitioners sought to communicate their message to ballet patrons at that time and place by peacefully and non-confrontationally distributing leaflets to patrons as they entered and left the theater during the time before they were moved from the Galleria. Petitioners' distribution of leaflets caused no disruption of any kind to anyone; nor is there any evidence in the record that such disruption would have been caused by further leafletting. Because of the configuration of the Denver Performing Arts Complex, no time or other public venue other than the Galleria existed at which petitioners could have reached

most of the ballet patrons to whom their leaflets were directed.

The court of appeals nevertheless upheld a complete ban on petitioners' proposed exercise of constitutional free expression rights solely because the proposed site of their expressive activity — the Complex's Galleria — is an enclosed space that does not have all the characteristics of a traditional public street or park. That decision is in direct conflict with the decision of this Court in *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992), as well as with the decisions of at least four other courts of appeals.

The legal standard applied by the court of appeals to the site of petitioners' proposed protest — whether petitioners' peaceful expressive activity "***could have conceivably run afoul***" of the city's interests in providing a "safe and comfortable environment" — would, moreover, provide a basis for wholly excluding expressive activity from the growing number of important public gathering places that are not, in every respect, identical to traditional public fora. Appendix A.1., p. 17a (emphasis added).

The court of appeals observed in its opinion that confusion and lack of clarity currently exists regarding the law applicable to petitioners' activity. This Court should grant review in order to provide needed clarification regarding the constitutional standard applicable to the exercise of free expression rights in modern public gathering places, as well as to correct the erroneous and unjustified suppression by the courts below of petitioners' First Amendment rights.

II. THE DECISION BELOW IS INCORRECT

The court of appeals' decision is incorrect for several

important and independent reasons:

a. The court of appeals incorrectly held that the Galleria area in which petitioners sought to leaflet is not a public forum. That area was, concededly, a traditional forum when it was a public street prior to the establishment of the Performing Arts Complex. Had Denver constructed theaters and other performing arts venues along that street, while leaving the street unroofed and open to vehicular traffic, there would be no doubt that the creation of such an "arts block" on a city street would not deprive the street and its adjacent sidewalks of their public forum character.

The court of appeals has decided, however, that, by closing the street to vehicular traffic, thus making it a "pedestrian walkway," and constructing a glass roof over the block on which the theaters are located, Denver has deprived the street of its public forum character. It so held despite the fact that the street is not gated or closed but is open to all members of the public 24 hours a day, contains cafes, a store, entry to a public garage, serves as the only viable access to a public sculpture garden and three public theaters, as well as a pedestrian walkway between other Denver streets.

The court of appeals' decision wholly ignores the statement in Justice Kennedy's opinion in *Lee*, joined by Justices Blackmun, Stevens and Souter, that the public forum "inquiry must be an objective one, based on the actual, physical characteristics and uses of the property," *Lee*, 505 U.S. at 694, and leaves the City's "unconstrained by an independent duty to respect the speech its citizens can voice there . . . ." *Id.* at 695. Accordingly, the City is given unlimited authority to "restrict speech on its property by doing nothing more than articulating a non-speech related purpose for the area . . . leav[ing] no scope for the development of new public forums absent the rare

approval of the government." *Id.* at 695.

The public street, now named the Galleria - - the only place from which patrons can enter the Colorado Ballet's theater - - does not lose its character as a public forum merely because it has been given a new name, because automobiles and bicycles have been excluded from it and a glass roof has been placed over it. None of those improvements makes the street either less public or less appropriate for First Amendment activity. Unless the installation of a glass roof makes a constitutional difference (an extremely dubious proposition), the decision of the court of appeals means, in effect, that any city hereafter will be free to deprive the streets and sidewalks of its financial district, or theater district, or main shopping district of their public forum character by banning vehicular traffic within those areas and converting them to pedestrian malls. The constitutional right to free expression cannot be so casually brushed aside by local governments.

b. Even if the Galleria were not a public forum for all purposes, it should certainly be treated as a designated public forum for the purpose of expressive activity specifically directed at the policies of a public institution — the Colorado Ballet — which performs in a theater that can only be reached by walking through the Galleria. There is no question that the musicians protesting the Ballet's decision to replace its live orchestra with taped music have a First Amendment right to communicate their disagreement by offering leaflets to the Ballet's patrons. *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357 (1997). No forum other than the Galleria adequately offers this opportunity. Fifty percent or more of the Ballet's patrons drive to the performances and park in the public parking garage that is part of the Performing Arts Complex. Those patrons do not enter any public street or area other than the Galleria from the time they leave their cars until they enter the theater. Restricting petitioners' leafletting activities to public streets adjoining the

Galleria thus totally deprives petitioners of at least half of the audience they are constitutionally entitled to reach. A restriction of that scope is impermissible. *See e.g., Madsen v. Woman's Health Clinic*, 572 U.S. 753, 814 (1994) ("[T]hese petitioners have a right not merely to demonstrate and protest at some reasonably effective place, but to demonstrate and protest where they want to and where all other Floridians can, namely, right there on the public sidewalk in front of the clinic.") (Scalia, J., concurring in part and dissenting in part.)

c. If the Galleria is a public forum, petitioners do not understand how the city (or the court of appeals) can suggest that an absolute ban on all leafletting within it can be justified under the applicable constitutional test.[1] But, even if the court of appeals were for some reason correct in concluding that the Galleria is not a public forum, its decision upholding Denver's absolute ban on leafletting within the Galleria would still be incorrect.

As noted in Justice O'Connor's prevailing opinion in *Lee*, a holding that an area is not a public forum only begins the inquiry: "The reasonableness of the Government's restriction [on speech in a nonpublic forum] must be assessed in light of the purpose of the forum and all the surrounding circumstances." *Id.* at 687 (citations omitted). Regulations like that imposed in the Galleria, prohibiting all First Amendment activities, are especially open to question under this reasonableness test. *See e.g., Board of Airport Comm'rs. Of City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987); *City of Ladue v. Gilleo*,

---

[1] A time, place or manner regulation in a public forum must be shown to be narrowly tailored to serve a substantial governmental interest. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988). Denver's absolute ban is obviously not narrowly tailored to satisfy this standard.

512 U.S. 43 (1994).

It is simply inconceivable that a small number of formally clad musicians, quietly standing in the Galleria outside the theater where the Colorado Ballet is performing for the purpose of politely offering leaflets to Ballet patrons in order to protest the Ballet's taped-music policy would interfere with any legitimate governmental interest.

Denver is free to set reasonable limits on the number of such leafletters or to prohibit them from acting disruptively or from interfering with patrons, or other Galleria activities. Denver, however, has no right to prohibit all leafletting, and has applied that absolute prohibition to leafletting specifically related to a Galleria activity in circumstances where no other adequate leafletting site is available to petitioners.

In *Lee*, a majority of this court invalidated a similar absolute leafletting prohibition applicable to New York Port Authority airports.[2] The court of appeals in this case distinguished *Lee* primarily on the ground that "the physical characteristics of the Galleria distinguish it from the airports in *Lee*" because the "commercial establishments [in the Galleria] do not compare in number or variety to those found within the airports." Appendix A.1., p. 15a. The "number or variety" of commercial establishments accessible from a public area, however, do not determine whether an absolute prohibition on expressive activity within that area is reasonable; nor are

---

[2] Four members of the Court (Justices Kennedy, Blackmun, Stevens, and Souter) reached this result through holding the airports' public areas to be public fora. *Lee*, 505 U.S. at 693. Justice O'Connor believed that the areas were not public fora, but held that the absolute prohibition on leafletting did not meet the reasonableness standard applicable to such areas.

"commercial" establishments the only relevant touchstone. The three theaters and other arts venues in the Galleria contribute to its public character at least as much as its cafes and store, if not more. Indeed, they are the core taxpayer-funded public institutions upon which the commercial establishments are dependent, not vice versa.

The relevant question is whether there is any reason to impose an absolute prohibition in view of the physical characteristics of the Galleria area and its use by the public. The fact that Denver has permitted dealership trucks or cars to be parked in the Galleria during performances for advertising purposes over days or weeks conclusively establishes that leafletters would not constitute a serious safety hazard if their number and position were reasonably regulated. Contrary to the conclusion of the court of appeals, the absolute prohibition in this case is no more reasonable than the similar prohibition in *Lee*. Denver's absolute prohibition is even more unreasonable in its application to petitioners than the absolute ban in *Lee*. The leaflets being distributed in *Lee* had no special relevance to activities in or policies of the airports. Here, petitioners have a particularly strong interest in being able to protest Ballet policies to Ballet patrons at the site of Ballet performances.

d. The standard employed by the court of appeals is also incorrect. The court of appeals held that the Galleria's absolute ban on leafletting was constitutional as applied to petitioners if their proposed activity "***could have conceivably run afoul*** of the city's interest in preserving the forum for its intended use." *Id.*, p. 17a (emphasis added). It further held that the city's legitimate interests included a "*comfortable* environment for [Performing Arts Complex] events." *Id.*, p. 18a (emphasis added). This is much too permissive a constitutional test. In order for an absolute ban on First Amendment activity in a public place to be considered reasonable, there must be at least some factual basis for concluding that such activity would be

harmful to the public even if subjected to appropriate time, place and manner regulations. *See Lee*, 505 U.S. at 692 (O'Connor, J. concurring). There is absolutely no such basis in this case. Nor is the desire to preserve a "comfortable" — i.e., a disagreement-free — environment a legitimate reason for prohibiting expressive activity. *See e.g., Martin v. City of Struthers*, 319 U.S. 141, 145 (1943).

It bears repeating that there is no indication whatsoever that petitioners' leafletting activity would in any way have interfered with the ability of ballet patrons to reach or leave the theater or to enjoy the performance within it.

e. The court of appeals holding that the application to petitioners of the Galleria's absolute ban on leafletting is "viewpoint-neutral" is also incorrect. Appendix A.1., p. 13a. As the court of appeals recognized, Denver permits the distribution within the Galleria of "publications promoting events taking place in city owned and operated facilities." Ballet patrons may thus be offered material within the Galleria promoting and describing the virtues of Colorado Ballet offerings — including the quality of the music at ballet performances. Petitioners are, at the same time, absolutely deprived of the opportunity to reach the same audience at the same place with their criticisms of Ballet policies and performances. In the absence of some factual basis for permitting only one side of such a controversy to be expressed within the Galleria, impermissible viewpoint discrimination exists.

III. THE DECISION BELOW CONFLICTS WITH OTHER CIRCUITS

The court of appeals' decision in this case is in direct conflict, not only with this Court's decision in *Lee*, but with

several court of appeals decisions of at least four other courts of appeals concerning the right to distribute leaflets in areas similar to the Denver Galleria.

— In *Jews for Jesus, Inc., v. Massachusetts Bay Transp. Auth.*, 984 F.2d 1319 (1st Cir. 1993), the court of appeals for the First Circuit struck down an absolute ban on leafletting applicable to areas inside and outside the turnstiles at metropolitan Boston subway stations.

— In *Gerritsen v. City of Los Angeles*, 994 F.2d 570 (9th Cir.), *cert. denied*, 510 U.S. 915 (1993), the Ninth Circuit struck down a ban on leafletting applicable to the Olvera Street shopping and dining area, a mall-like pedestrian only street within a Los Angeles State Historic Park.

— In *Paulsen v. County of Nassau*, 925 F.2d 65 (2nd Cir. 1991), the Second Circuit affirmed the grant of a preliminary injunction allowing leafletting within the Nassau County Coliseum a complex containing an indoor sports and exhibition halls. The Second Circuit determined that "distributing handbills on the plaza and the sidewalks is not likely . . . to interfere with the mood or quality of the Coliseum Arena events, which have included performances by diversified entertainment such as the New York Islanders, Bruce Springstein, Motley Crue, R.E.M., and the TNT Monster Truck Challenge." *Id.*, p. 71a.

— In *Chicago ACORN v. Metropolitan Pier and Exposition Auth.*, 150 F.3d 695 (7th Cir. 1998), the Seventh Circuit, in an opinion by Chief Judge Posner, upheld the right to distribute leaflets in "rather narrow indoor mall areas" within Chicago's Navy Pier, a "recreational and commercial center

part park, part meeting and exhibition facility, part shopping emporium, part amusement park." *Id.* at 703. The court held that "there is no relevant difference between the [outdoor] sidewalks on Navy Pier and the public areas of the indoor shopping malls. Both types of pathway are pedestrian walkways leading mainly to shops. The fact that one type has a roof over it and the other does not cannot make [a] large difference . . . ." The court noted, however, that leafletting might be prohibited "in places where pedestrian traffic will be obstructed." *Id.* at 704.

It is evident from the opinions in these cases that other circuits would have struck down the total ban on leafletting within the Denver Galleria. Indeed, an important factor supporting petitioners' right in the present case — the fact that their leafletting directly related to activity being conducted within the Complex — was not present in any of these decisions. Review of the present case is required in order to resolve existing direct conflict in court of appeals decisions.

IV. THIS COURT'S FORUM DOCTRINE MUST BE APPLIED TO PROTECT FIRST AMENDMENT RIGHTS IN A CHANGING SOCIETY

The issues presented by the conflicting court of appeals decisions are of substantial and increasing importance. As Justice Kennedy's opinion for four members of the court in *Lee* recognized, the evolution of the American city in recent years has resulted in traditional public fora — ordinary streets and parks — playing a steadily decreasing role as public gathering and meeting places. *Lee*, 505 U.S. at 697-698. They are being replaced in this role by areas like Denver's Performing Arts Complex — publicly owned tax payer funded property from the traditional grid of city streets, reached by automobile or public transportation and containing on-site parking facilities, and

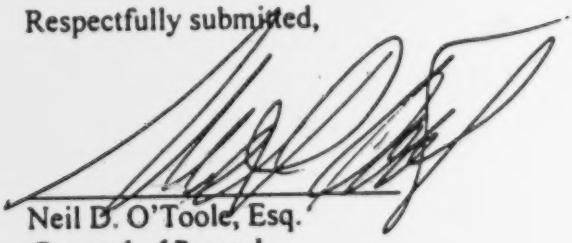
dedicated to particular public functions, such as sports entertainment, commerce or the arts. The failure to recognize that these tax payer-financed (directly or indirectly) pedestrian malls, sports, and arts complexes, and similar areas are fully appropriate fora for speech will inevitably lead to "a serious curtailment of our expressive activity." *Lee*, 505 U.S. at 698. (Kennedy, J., concurring.)

The result reached by the court in *Lee* vindicated the right of citizens to engage in peaceful and non-obstructive leafletting in such places. *Lee*, however, did not produce an opinion of the Court explaining the application of public forum doctrine in modern, non-traditional, public gathering places like that involved in *Lee* and the present case. The resulting confusion and lack of doctrinal clarity has been noted by the court of appeals opinion in this case, as well as by the Seventh Circuit's recent opinion in *Chicago ACORN, supra.* The Court should grant review in this case in order to ensure that free expression rights continue adequately to be protected in areas that serve as the contemporary equivalent of traditional public fora.

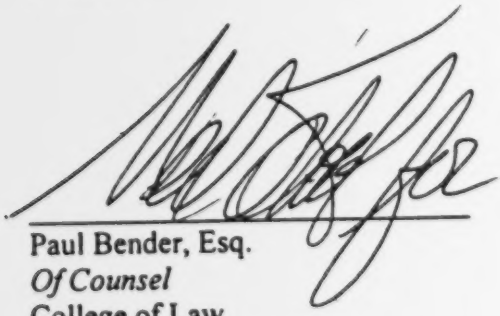
CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Neil D. O'Toole, Esq.
Counsel of Record
John A. Sbarbaro, Esq.
Law Office of Neil O'Toole, P.C.
226 West 12th Avenue
Denver, CO 80204
(303) 595-4777



Paul Bender, Esq.
Of Counsel
College of Law
Arizona State University
Tempe, AZ 85287
(505) 842-9960

In The

Supreme Court of the United States

October Term, 1999

JACK HAWKINS, individually and as President of the Denver Area Labor Federation and PETE VRIESENGA, individually and as President of Denver Musicians Association,

Petitioners,

vs.

CITY AND COUNTY OF DENVER, GARY LANE, Director of the Denver Theaters and Arenas, BROOK NICHOLS, Assistant Building Manager of the Denver Theaters and Arenas and DAVID MICHAUD, as Chief of the Denver Police Department,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

APPENDIX

TABLE OF CONTENTS

Page

Appendix A – Opinions, Orders
Appendix A 1 – Opinion of the United States Court of Appeals for the Tenth Circuit (Filed 3/10/99).....1a

Appendix A 2 – Judgment of United States District Court 24a

Appendix A 3 – Transcript of United States District Court's Oral Ruling (12/3/97)..... 26a

Appendix B – Order of the United States Court of Appeals For the Tenth Circuit Denying Rehearing (Filed 4/6/99) 49a

Appendix C – Constitutional Provision and Denver Regulations and Procedures..... 50a

Appendix D – Photos..... 53a

1. Photo of Leafletting by Musicians in October, 1997 ..... 55a

2. Evening Photo of Leafletting by Musicians in October, 1997.....57a

3. Daylight Photo of Speer Blvd. Entrance to Galleria 59a

4. Daylight Photo Taken Inside the Galleria in December, 1997, Showing Pedestrian Traffic.....61a

5. Daylight Photo of the Galleria Taken in December, 1997, Showing Display of 1998 Lincoln.....63a

APPENDIX A 1 – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED MARCH 10,1999

--- F.3d ----
160 L.R.R.M. (BNA) 2705
(Cite as: 1999 WL 125479 (10th Cir.(Colo.)))

Jack HAWKINS, individually and as President of the Denver Area Labor Federation and Pete Vriesenga, individually and as President of Denver Musicians Association, Plaintiffs--Appellants,

v.

CITY AND COUNTY OF DENVER; Gary Lane, Director of the Denver Theaters and Arenas, Brook Nichols, Assistant Building Manager of the Denver Theaters and Arenas; and David Michaud, as Chief of the Denver Police Department, Defendants--Appellees.

No. 98-1003.

United States Court of Appeals,
Tenth Circuit.

March 10, 1999.

Appeal from the United States District Court for the District of Colorado. (D.Ct. No. 97-S-2474)

Neil D. O'Toole (John A. Sbarbaro, with him on the brief), Law Office of Neil O'Toole, P.C., Denver, Colorado, appearing for Plaintiffs-Appellants.

Stanley M. Sharoff, Assistant City Attorney (Daniel E. Muse, City Attorney, with him on the brief), Denver, Colorado, appearing for Defendants-Appellees.

Before TACHA, BARRETT, and HENRY, Circuit Judges.
TACHA, Circuit Judge.

*1 Plaintiff-Appellants represent a group of union musicians who wish to picket and distribute leaflets expressing their grievance against the Colorado Ballet in the "Galleria" area of the Denver Performing Arts Complex ("DPAC"). The City and County of Denver ("Denver"), which owns and operates the DPAC, halted plaintiffs' demonstrations in the Galleria. In response, plaintiffs filed a civil rights complaint pursuant to 42 U.S.C. § 1983 in the United States District Court for the District of Colorado, claiming that Denver violated their First Amendment rights by denying them access to the Galleria. They sought a preliminary and permanent injunction against defendants allowing them to proceed unabated with their picketing and leafletting. The district court denied plaintiffs' request for injunctive relief and dismissed the case. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

I. Description of the Galleria

The events in this case involve an area of the DPAC known as the Galleria. The Galleria is an open air, glass-covered pedestrian walkway approximately 600 feet long, with a width ranging between 32 and 40 feet. As illustrated by the maps following this opinion, the Galleria, which was formerly a public street, is bounded on one side by two large theaters, the Temple Hoyne Buell Theatre and the Auditorium Theatre, and on the other side by the DPAC parking garage and the Garner Galleria Theatre. Fourteenth Street, a public right of way, lies at one end of the Galleria. Several additional performing arts complexes and a sculpture park, which separates the DPAC from Speer Boulevard, lie at the other.

The Galleria serves as the exclusive means of ingress to and egress from DPAC events taking place in the adjacent performing arts complexes, which have a combined seating capacity of approximately 9,300. [FN1] Many DPAC patrons enter the Galleria from the DPAC garage, but the garage has a limited parking capacity of around 1,600 spaces. Therefore, on busy occasions, as many as 40 to 50 percent of the total patrons enter the Galleria from the 14th Street entrance. The Galleria also acts as a place for theater patrons to congregate before performances and during intermissions, in effect serving as an extended lobby for the various performing arts venues. During these periods, and when patrons are arriving or departing from DPAC events, the Galleria can become extremely congested, particularly when multiple events are scheduled. Ticket sales also occur at box offices in the Galleria, with lines often stretching across the walkway. Finally, the Galleria serves as the main evacuation route for the performing arts complexes in the event of an emergency, such as a fire.

Although the DPAC's primary function is to showcase artistic performances, several commercial establishments lease space within the confines of the facility. These consist of two cafes and a business called Scene-to-Screen, which, among other things, sells retail merchandise and souvenirs relating to productions appearing at the DPAC. The record shows that at least one of these establishments opens only in conjunction with performances because it is not profitable in the absence of DPAC patron traffic. Denver allows leaseholders to promote their businesses within the Galleria through the use of small signs. Denver also makes brochures listing events at other venues it owns and a publication that promotes events at the DPAC available in the Galleria. Occasionally, Denver leases promotional space within the Galleria. For example, a car dealership once paid to place a truck in the Galleria for a period of time during and after a performance festival.

II. Background

*2 Having described the stage for this dispute, we will now recount the facts giving rise to this appeal. On September 25, 1997, the Artistic Director and Chief Executive Officer of the Colorado Ballet informed plaintiff Pete Vriesenga, President of the Denver Musicians Association, that it would replace the live orchestra with an audio tape recording during its performance of "Romeo and Juliet." The Colorado Ballet was, at that time, a tenant of the DPAC's Temple Hoyne Buell Theatre. On October 10, 1997, plaintiffs, acting on behalf of the terminated union musicians, informed Denver officials that they intended to picket and leaflet at the October 11 opening of "Romeo and Juliet." That same day, plaintiff Vriesenga received a memo from Denver stating that it prohibited picketing and leafletting within the DPAC [FN2] but noting that it permitted such activity on the public right of ways surrounding the facility. On October 11, 1997, plaintiffs, as well as members of the Denver Area Musicians Association, assembled in the Galleria as planned and

began picketing and leafletting during the opening of the ballet. The leaflet plaintiffs distributed called attention to the union musicians' dispute with the Colorado Ballet and attempted to gain sympathy for their cause by suggesting that the Ballet had overcharged patrons for their tickets. [FN3] During the demonstration, a Denver official informed plaintiffs that they could not picket and leaflet within the Galleria and demanded they leave. The official also told plaintiffs that if they refused to leave, he would summon the police. By the end of the night, police had arrived and warned plaintiffs that if they continued to picket and leaflet within the Galleria, they would be arrested.

On October 12, 1997, plaintiffs returned to the Galleria, but police removed them shortly thereafter. Plaintiff subsequently limited their picketing and handbilling to the entrances adjoining the Galleria and the DPAC garage. The next day, Denver's attorney sent plaintiffs a letter reiterating Denver's policy not to allow picketing or leafletting within the Galleria. At each of the remaining performances of "Romeo and Juliet," plaintiffs protested, but not within the Galleria. Eventually, police removed plaintiffs from all DPAC facilities and instructed them to confine their activities to the public sidewalks and 14th Street entrance. [FN4]

On November 4, 1997, plaintiffs notified Denver officials that they intended to continue their picketing and leafletting during the Colorado Ballet's performance of "The Nutcracker," scheduled to run between November 29 and December 28, 1997. Having received no response from Denver, plaintiffs filed a § 1983 complaint on November 24, 1997, requesting a preliminary and permanent injunction "directing the City and County of Denver and the defendants from interfering with or restricting the plaintiffs' right to picket or handbill at the DPAC 'Galleria'

area and all other public places in and surrounding the DPAC." Compl. at 11. Pursuant to Federal Rule of Civil Procedure 65(a)(2), the district court conducted a consolidated hearing with a trial on the merits on December 3, 1997. At the conclusion of the consolidated hearing, the district court, in an oral ruling, determined that the Galleria was not a public forum and that Denver's restrictions were reasonable. The court denied plaintiffs' request for an injunction and dismissed plaintiffs' § 1983 claim on the merits. This appeal followed.

III. Discussion

*3 In a First Amendment case, we perform an independent examination of the record to ensure protection of free speech rights. *See Revo v. Disciplinary Bd. of the Supreme Court for the State of N.M.*, 106 F.3d 929, 932 (10th Cir.1997), cert. denied,--U.S.--, --- U.S. ----, 117 S.Ct. 2515, 138 L.Ed.2d 1017 (1997); *Brown v. Palmer*, 915 F.2d 1435, 1441 (10th Cir.1990), aff'd on reh'g en banc, 944 F.2d 732, 733 n. 1 (10th Cir.1991). We also review the district court's findings of constitutional fact and conclusions of law de novo. *See Revo,* 106 F.3d at 932.

A.

Plaintiffs argue that Denver's refusal to allow them to picket and leaflet within the Galleria constitutes a violation of their First Amendment rights. We note as an initial matter that the district court did not characterize the nature of plaintiffs' First Amendment claim as a facial or "as applied" challenge to Denver's DPAC speech policy. However, an examination of plaintiffs' complaint demonstrates that plaintiffs' claim is more appropriately characterized as an "as applied" challenge. Plaintiffs do not seek declaratory relief or assert that Denver's DPAC speech policy is unconstitutional when applied to others

or because of overbreadth. Rather, it is clear from the face of plaintiffs' complaint that they "seek to vindicate their own rights," not those of all persons who may wish to use the Galleria as a protest site. *Jacobs v. The Fla. Bar*, 50 F.3d 901, 906 (11th Cir.1995); see also *Falanga v. State Bar of Ga.*, 150 F.3d 1333, 1335 n. 4 (11th Cir.1998); *Jordahl v. Democratic Party of Va.*, 122 F.3d 192, 198-99 (4th Cir.1997).

The First Amendment, as applied to state and local governments through the Fourteenth Amendment, provides that state actors "shall make no law ... abridging the freedom of speech." U.S. Const. amend. I. The First Amendment applies not only to legislative enactments, but also to less formal governmental acts, such as city policies. *See*, e.g., *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273, 1277-78 (10th Cir.1996) (applying First Amendment analysis to city policy prohibiting the use of senior centers for religious purposes). It is well established that the picketing and leafletting at issue in this case are soundly within the scope of protected speech under the First Amendment. *See*, e.g., *Schenck v. Pro-Choice Network of W.N.Y.*,-- U.S.--, 519 U.S. 357, 117 S.Ct. 855, 867, 137 L.Ed.2d 1 (1997); *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 677 (1992). However, the government "need not permit all forms of speech on property it owns and controls." Lee, 505 U.S. at 678; *see* also *United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129- 30, 101 S.Ct. 2676, 69 L.Ed.2d 517 (1981). The extent of the government's ability to restrict protected speech on public property depends upon the nature of the forum and whether the speech restriction is content-based or content- neutral. *See Lee*, 505 U.S. at 678-79.

*4 The Supreme Court has identified three distinct categories of government property: (1) traditional public fora; (2) designated public fora; and (3) nonpublic fora. *See*, e.g., *Arkansas Educ. Tele. Comm'n v. Forbes*,--U.S.--, 523 U.S. 666, 118 S.Ct. 1633,

1641, 140 L.Ed.2d 875 (1998); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). Traditional public fora are places that "by long tradition or by government fiat have been devoted to assembly and debate." *Perry*, 460 U.S. at 45. Quintessential traditional public fora are streets, sidewalks, and parks, for they "have immemorially been held in trust for the use of the public and, time out of mind, have been used for the purposes of assembly, communicating thoughts between citizens, and discussing public questions." Id. (quoting *Hague v. CIO*, 307 U.S. 496, 515, 59 S.Ct. 954, 83 L.Ed. 1423 (1939)); *see* also, e.g., *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1244 (10th Cir.1998) (en banc), petition for cert. filed, 67 U.S.L.W. 3496 (U.S. Jan. 25, 1999) (No. 98-1193). The government's ability to restrict speech in a traditional public forum is quite limited and, as noted earlier, depends upon whether the speech restriction is content-based or content-neutral. The government must show that a content-based restriction is "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Perry*, 460 U.S. at 45; accord *Forbes*, 118 S.Ct. at 1641. On the other hand, we will uphold content-neutral time, place, and manner restrictions on speech provided they are "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry*, 460 U.S. at 45.

Designated public fora make up the second category of government property. The designated public forum, whether of a limited or unlimited character, is one a state creates "by intentionally opening a non-traditional forum for public discourse." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985) (emphasis added); accord *Lee*, 505 U.S. at 678. In determining whether the government intended to create a designated public forum, we examine both its policy and practice. *See Forbes*, 118 S.Ct. at 1641; *Cornelius*, 473 U.S. at 802. Examples of designated public fora include: state university meeting facilities

expressly made available for use by students, *see Widmar v. Vincent*, 454 U.S. 263, 267-69, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981); school board meetings open to the public by state statute, *see City of Madison, Jt. Sch. Dist. No. 8 v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 174-75, 97 S.Ct. 421, 50 L.Ed.2d 376 (1976); advertising space in state-owned subway and commuter rail stations, *see Christ's Bride Ministries, Inc. v. Southeastern Penn. Transp. Auth.*, 148 F.3d 242, 252 (3d Cir.1998); a city owned and operated senior center sponsoring lectures, *see Church on the Rock v. City of Albuquerque*, 84 F.3d 1273, 1278 (10th Cir.1996); and public libraries, *see Kreimer v. Bureau of Police for the Town of Morristown*, 958 F.2d 1242, 1261 (3d Cir.1992). "Although a State is not required to indefinitely retain the open character of the facility, as long as does so it is bound by the same standards as apply in a traditional public forum." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983); accord *Lee*, 505 U.S. at 678.

*5 The final category, nonpublic fora, consists of any remaining government property that "is not by tradition or designation a forum for public communication." *Perry*, 460 U.S. at 46; accord *Lee*, 505 U.S. at 678; *Church on the Rock*, 84 F.3d at 1278. In a nonpublic forum, the government has much greater latitude to restrict protected speech. The law draws no distinction between content-neutral and content-based restrictions in a nonpublic forum. Provided the restriction is reasonable in light of the purpose served by the forum and is "not an effort to suppress expression merely because public officials oppose the speaker's view," it does not violate the First Amendment. *Forbes*, 118 S.Ct. at 1641; *see* also, e.g., *Lee*, 505 U.S. at 679; Cornelius, 473 U.S. at 806. For a court to uphold a speech restriction as reasonable, "it need not be the most reasonable or the only reasonable limitation." *Lee*, 505 U.S. at 683 (quoting *United States v. Kokinda*, 497 U.S. 720, 730, 110 S.Ct. 3115, 111 L.Ed.2d 571 (1990) (plurality opinion)). Furthermore, "[i]n

contrast to a public forum, a finding of strict incompatibility between the nature of the speech or the identity of the speaker and the functioning of the nonpublic forum is not mandated." *Cornelius*, 473 U.S. at 808.

B.

Based upon our review of the record, we conclude that the DPAC's Galleria is a nonpublic forum. The Galleria does not qualify as a traditional public forum, for it is not a park, nor is it analogous to a public right of way or thoroughfare. The Galleria does not form part of Denver's automotive, bicycle or pedestrian transportation grid, for it is closed to vehicles, and pedestrians do not generally use it as a throughway to another destination. Rather, the Galleria's function is simply to permit ingress to and egress from the DPAC's various complexes. Cf. *Chicago Acorn v. Metropolitan Pier & Exposition Auth.*, 150 F.3d 695, 702 (7th Cir.1998) (finding sidewalks on Navy Pier were not traditional public fora because they "are not through routes; they lead only to the pier facilities themselves"). Although Denver admits that the Galleria is generally open to the public, "[p]ublicly owned or operated property does not become a 'public forum' simply because members of the public are permitted to come and go at will." *Lee*, 505 U.S. 686 (O'Connor, J., concurring) (quoting *United States v. Grace*, 461 U.S. 171, 177, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983)). Moreover, the fact that the Galleria was constructed on what used to be a public street does not render it a traditional public forum. The government may, by changing the physical nature of its property, alter it to such an extent that it no longer retains its public forum status. *See ACLU of Nevada v. City of Las Vegas*, 13 F.Supp.2d. 1064, 1074- 75 (D.Nev.1998) (citing *Hale v. Department of Energy*, 806 F.2d 910, 915-16 (9th Cir.1986)). As stated by Justice Kennedy in his *Lee* concurrence:

*6 In some sense the government always retains authority to close a public forum, by selling the property, changing its physical character, or changing its principal use. Otherwise the State would be prohibited from closing a park, or eliminating a street or sidewalk, which no one has understood the public forum doctrine to require.... [The government] must alter the objective physical character or uses of the property, and bear the attendant costs, to change the property's forum status.

Lee, 505 U.S. at 699-700 (Kennedy, J., concurring). In constructing the Galleria, Denver has altered the physical characteristics and function of the former public street sufficiently to remove its status as a traditional public forum.

The Galleria also does not fit the description of a designated public forum, for Denver has neither in policy nor practice thrown open the Galleria for public expressive activity. Denver's written DPAC speech policy clearly states that demonstrations and leafletting are not permitted within the DPAC "without the express consent of the Facility Manager of Denver." Appellee's App. at 6. This policy hardly opens the Galleria up for public assembly and debate, especially in light of the fact that, in practice, Denver officials have enforced this policy as an absolute ban on leafletting and picketing in the Galleria. DPAC officials have removed protestors from the Galleria on several occasions. For example, the record indicates that on one such occasion an anti- abortion group attempted to demonstrate within the Galleria, but DPAC officials asked them to restrict their activities to the public sidewalks surrounding the DPAC. On another occasion, DPAC officials denied political party representatives permission to place posters and demonstration materials within the Galleria. Denver has even prohibited an individual from handing out free roses to DPAC patrons in the Galleria. This consistent practice of not allowing picketing or leafletting in the Galleria shows the Galleria has "never been

dedicated ... *to expression in the form sought to be exercised here."* Lee, 505 U.S. at 682.

Plaintiffs make much of the fact that Denver allows some speech in the Galleria. For example, plaintiffs point to advertising and promotional leaflets in the Galleria. The record indicates, however, that the speech plaintiffs refer to is limited to advertising by DPAC tenants and publications promoting events taking place in city owned and operated facilities. This does not create a designated public forum for plaintiffs' proposed activities. Neither does the fact that Denver allows patrons to discuss matters of public interest in the Galleria. Even if Denver allowed patrons to wear political buttons or shirts with slogans, this would not be sufficient to establish a designated public forum. The First Amendment does not require the government to impose a "zone of silence" on its property to maintain its character as a nonpublic forum. As the Supreme Court stated in *Cornelius*, "[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985) (emphasis added); accord *Brown v. Palmer*, 915 F.2d 1435, 1443 (10th Cir.1990), aff'd on reh'g en banc, 944 F.2d 732 (10th Cir.1991). We find that the limited speech involved in this case does not demonstrate an intent on the part of the city to establish the Galleria as a designated public forum. Instead, it is merely related to and consistent with the normal business operation of the DPAC.

*7 Because the Galleria does not constitute a public forum by tradition or designation, it is a nonpublic forum. Consequently, we need not address whether Denver's DPAC speech policy banning picketing and leafletting is content-based or content-neutral. All we must consider is whether the policy, as

applied to the plaintiffs in this case, is viewpoint-neutral and reasonable in light of the forum's purpose. *See*, e.g., *Arkansas Educ. Tele. Comm'n v. Forbes*,-- U.S.--, 523 U.S. 666, 118 S.Ct. 1633, 1641, 140 L.Ed.2d 875 (1998).

C.

Denver did not apply the policy in this case to the plaintiffs on the basis of their viewpoint. Rather, the record shows that Denver consistently enforces its DPAC speech policy as a flat ban on all leafletting, demonstrations, and similar activities. [FN5] Plaintiffs also suggest that their inability to criticize the ballet in their chosen manner is viewpoint-based because patrons receive positive commentary about the ballet in the promotional type materials available in the Galleria. However, denying the plaintiffs the opportunity to rebut all messages does not amount to unlawful viewpoint discrimination. "Government speech would be unduly chilled if any individual or group with views contrary to those of the government were entitled to access to non-public governmental fora for rebuttal." *Brown*, 915 F.2d at 1445. Thus, we find Denver's DPAC speech policy to be viewpoint-neutral.

This brings us to the reasonableness of Denver's refusal to allow plaintiffs to picket and leaflet within the Galleria. The Supreme Court's analysis in *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992), guides us in this inquiry. In Lee, members of a non-profit religious organization wished to solicit donations and distribute written materials within several airport terminals owned and operated by the Port Authority of New York and New Jersey. A Port Authority regulation which forbade the repetitive solicitation of money or distribution of literature prevented them from engaging in such activities. The religious organization filed a § 1983 claim against the Superintendent of the Port Authority, asserting a First

Amendment facial challenge to the Port Authority's regulation. The Supreme Court held that the airport was a nonpublic forum and that the Port Authority's ban on solicitation was reasonable. See id. at 680-85. However, the Court also found the ban on leafletting unreasonable given the multipurpose nature of the airports and the evidence in the record. See id. at 692 (O'Connor, J., concurring). In actuality, this constitutes only Justice O'Connor's view, who provided the swing vote in the highly-fractured Lee decision, but as the narrowest majority holding, we are bound by it. *See Lee v. International Soc'y for Krishna Consciousness, Inc.*, 505 U.S. 830, 831, 112 S.Ct. 2709, 120 L.Ed.2d 669 (1992) (announcing, per curiam, the judgment of the Court on the question of leafletting); *Chicago Acorn v. Metropolitan Pier & Exposition Auth.*, 150 F.3d 695, 702 (7th Cir.1998).

*8 In her concurring opinion, Justice O'Connor elaborated on the reasonableness standard, stating that: "The reasonableness of the Government's restriction [on speech in a nonpublic forum] must be assessed in light of the purpose of the forum and all the surrounding circumstances." *Lee*, 505 U.S. at 687 (O'Connor, J., concurring) (alterations in original) (quoting *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 809, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985)). Justice O'Connor then examined the characteristics of the airports, noting that in contrast to typical single- purpose facilities, the airports were "huge complex[es] open to travelers and nontravelers alike" that contain a multitude of commercial establishments, including: "restaurants, cafeterias, snack bars, coffee shops, cocktail lounges, post offices, banks, telegraph offices, clothing shops, drug stores, food stores, nurseries, barber shops, currency exchanges, art exhibits, commercial advertising displays, bookstores, newsstands, dental offices, and private clubs." Id. at 688 (O'Connor, J., concurring). After analyzing the nature of the expressive activity at issue, Justice O'Connor concluded that unlike solicitation, which poses problems of congestion and

fraud, "it is difficult to point to any problems intrinsic to the act of leafletting that would make it naturally incompatible with a large, multipurpose forum such as those at issue here." Id. at 690 (O'Connor, J., concurring).

Justice O'Connor's opinion in Lee has created some confusion as to the level of scrutiny applied under the reasonableness test. Chief Judge Posner very recently noted that "[w]hat is particularly interesting about Justice O'Connor's swing opinion is that it blurs the line between the public and non- public forum, suggesting a sliding scale approach--a standard versus a rule of categories--in which the benefits and costs of free speech are balanced in particular settings." *Chicago Acorn*, 150 F.3d at 703. Thus, Justice O'Connor's opinion in *Lee* describes the reasonableness test as a factually- intensive, individualized inquiry. Such an approach leaves unclear whether the right to leaflet found in *Lee* would extend to the Galleria. To make this determination we must, like the Court in *Lee*, examine the particular nature of public expression in this case and the extent to which it interferes with the designated purposes of the Galleria, given the Galleria's physical attributes. *See Lee*, 505 U.S. at 689 (O'Connor, J., concurring).

To be sure, the physical characteristics of the Galleria distinguish it from the airports in *Lee*. While it is true that the Galleria contains or is adjacent to a few commercial establishments, they do not compare in number or variety to those found within airports. The record indicates that three commercial establishments within the DPAC are incidental to its primary purpose of showcasing artistic performances. They provide food and souvenirs to DPAC patrons. In fact, one opens only proximate to times of performances. This differs significantly from the "wide range of activities" promoted at the airport in *Lee, id.* at 688 (O'Connor, J., concurring), which Justice

O'Connor characterized as "a shopping mall as well as an airport," see id. at 689 (O'Connor, J., concurring); cf. *Chicago Acorn*, 150 F.3d at 703-04 (finding indoor shopping mall area was similar to airport in *Lee*). Another physical difference between the Galleria and an airport is its size. Unlike airports, which Justice O'Connor describes as "huge complex[es]," *Lee*, 505 U.S. at 688 (O'Connor, J., concurring), the Galleria is a comparatively narrow corridor, having a width between 32 and 40 feet. Cf. *Chicago Acorn*, 150 F.3d at 698, 704 (applying *Lee* holding to the Navy Pier, which is approximately 400 feet wide and 3000 feet long).

*9 In essence, the Galleria has more limited purposes than a large, multipurpose environment like an international airport or a mall. The Galleria serves as the exclusive means of ingress to and egress from the adjacent performing arts complexes, and it also functions as an extended lobby area where patrons can congregate before performances and during intermission. Additionally, the Galleria is the main evacuation route for the performing arts complexes in the event of an emergency. It is with an eye towards these limited purposes that we gauge whether the speech restriction in this case is reasonable.

Because we are faced with an "as applied" rather than a facial challenge, we must examine the city's interest in preserving the forum for its designated uses in light of the actual or proposed use the plaintiffs intended to make of the forum. The record indicates that plaintiffs planned to demonstrate in the Galleria for approximately one hour before the performance of "Romeo and Juliet" and about ten minutes after. They intended to stage similar demonstrations at performances of "The Nutcracker." We therefore consider Denver's application of the speech restriction only during times just before and after performances and express no opinion as to the restriction's application at other times.

Plaintiffs sought to dispatch approximately twenty-five individuals, dressed in formal attire, throughout the Galleria to distribute leaflets to DPAC patrons as they passed by. [FN6] Although Denver admits that plaintiffs did not cause any congestion problems or major disruption on the particular occasion that they demonstrated within the Galleria, that is not dispositive. "[T]he Government need not wait until havoc is wreaked to restrict access to a nonpublic forum." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 810, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985). We must therefore consider whether plaintiffs' proposed use could have conceivably run afoul of the city's interest in preserving the forum for its intended use.

Given the Galleria's physical attributes and purposes as well as the circumstances under which plaintiffs sought to protest, we conclude that the city's decision to deny plaintiffs access was reasonable and consistent with Denver's legitimate interest in "preserv[ing] the property ... for the use to which it was lawfully dedicated." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 50-51, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983) (internal quotation marks and citations omitted). It is important that the times when plaintiffs wished to picket and leaflet in the Galleria are precisely when the Galleria reaches peak traffic flow. During these times, the Galleria can become extremely crowded, making it difficult for DPAC patrons to move about freely. Protests, including leafletting, present a legitimate risk of congestion during peak hours in a forum as spatially confined as the Galleria. While leafletting is a mechanical process that is less obtrusive than in-person solicitation, this does not mean that it does not carry its own problems. In a forum the size of the Galleria, when a steady flow of pedestrian traffic is occurring, one cannot ignore the possibility that twenty-five or more individuals remaining stationary or walking against the flow of traffic could cause some obstruction. Some DPAC patrons may also prefer to avoid the leafletters entirely, thereby changing

their direction, further disrupting the flow of pedestrian traffic. Moreover, as Chief Justice Rehnquist noted in his dissenting opinion in *Lee*, some DPAC patrons "may choose not simply to accept the material but also to stop and engage the leafletter in debate, obstructing those who follow." 505 U.S. at 831 (Rehnquist, C.J., dissenting). But see *Jews for Jesus, Inc. v. Massachusetts Bay Transp. Auth.*, 984 F.2d 1319, 1324-25 (1st Cir.1993) (striking down a ban on leafletting in subway system and stating that "[t]he Supreme Court [in *Lee*] has dismissed the danger to traffic congestion as a justification to ban leafletting"). This risk of cngestion presents real safety concerns, especially considering the Galleria serves as the emergency exit for the entire complex.

*10 Furthermore, allowing groups, including the plaintiffs, to leaflet and express themselves before and after performances invites a host of additional expressive activity at odds with the DPAC's limited purpose as an entertainment venue. We agree with defendants that such activity could seriously disrupt the ability of the Galleria to serve its designated functions. Denver's interest in preserving the Galleria for such purposes, in turn, provides its patrons with a safe and comfortable environment for DPAC events. The leafletting ban reasonably serves that interest, for we find nothing unreasonable in Denver's decision to keep the Galleria area clear of leafletters and protestors during its peak times. [FN7] Cf. *United States v. Kokinda*, 497 U.S. 720, 731-33, 110 S.Ct. 3115, 111 L.Ed.2d 571 (1990) (finding solicitation ban on sidewalk designated as route from parking lot to post office is reasonable because solicitation disrupts post office business); *Cornelius*, 473 U.S. at 808-10 (finding reasonable the exclusion of legal defense and political advocacy group from organized federal employee charity drive designed to provide direct health and welfare services to individuals because government sought to provide direct, rather than indirect, assistance and government sought to avoid workplace disruption and reduced campaign participation that could result from

inclusion of groups viewed as political); *Chicago Acorn*, 150 F.3d at 703 (striking down total ban on leafletting on the Navy Pier, but finding that "plaintiffs should not be permitted to hand out leaflets in places where pedestrian traffic would be obstructed"). We reiterate that a speech restriction in a nonpublic forum "need not be the most reasonable or the only reasonable limitation," *Lee*, 505 U.S. at 683 (quoting *Kokinda*, 497 U.S. at 730 (plurality opinion)), in order to pass constitutional muster. Plaintiffs are therefore not entitled to the injunctive relief sought in their complaint.

We add that insofar as plaintiffs appeal the district court's decision not to grant a preliminary injunction, that decision is reviewed only for an abuse of discretion. See *Chemical Weapons Working Group, Inc. v. United States Dep't of the Army*, 111 F.3d 1485, 1489 (10th Cir.1997). "An abuse of discretion occurs only when the trial court bases its decision on an erroneous conclusion of law or where there is no rational basis in the evidence for the ruling." Id. (quoting In re *Coordinated Pretrial Proceedings in Petro. Prod. Anti- trust Litig.*, 669 F.2d 620, 623 (10th Cir.1982)). After reviewing the merits of plaintiffs' claim and finding no First Amendment violation, we also conclude that the trial court did not abuse its discretion in denying plaintiffs' request for a preliminary injunction.

IV. Conclusion

*11 For the reasons discussed above, plaintiffs have failed to show that defendants violated their First Amendment rights. Accordingly, we AFFIRM the decision of the district court.

Attachment not available electronically.

FN1. Denver touts the DPAC as offering "more performing spaces in a single complex than any other of its kind in the nation." Compl., Ex. A.

FN2. Although Denver's written policy appears to permit handbilling in the DPAC with the "express consent" of Denver officials, the record establishes that it has been the long-term policy of Denver to ban all picketing and handbilling within the DPAC.

FN3. The pertinent text of the leaflet states:

Romeo & Juliet [--] Full price for half the show! The CEO/Artistic Director of the Colorado Ballet has decided to fire the entire orchestra and replace them with taped (jukebox) music. The only problem is, he did not tell you this before you paid full price for your ticket. You are entitled to a refund, or at least, a raincheck for a performance that has a complete product for which you have paid. Contact Martin Fredmann, CEO of the Colorado Ballet at 837-8888 to voice your opinion. Colorado Ballet commits unfair labor practice against members of AFM Local 20-623. We have no dispute with any other employer[.]

Appellant's App. at 143.

FN4. Although plaintiffs have been excluded entirely from the DPAC, they only present arguments on appeal with respect to the Galleria, and not other portions of the DPAC, such as the garage. Thus, we shall only address whether Denver has violated plaintiffs' rights by refusing them access to the Galleria.

FN5. Although plaintiffs point to testimony by DPAC officials indicating that, under Denver's written DPAC

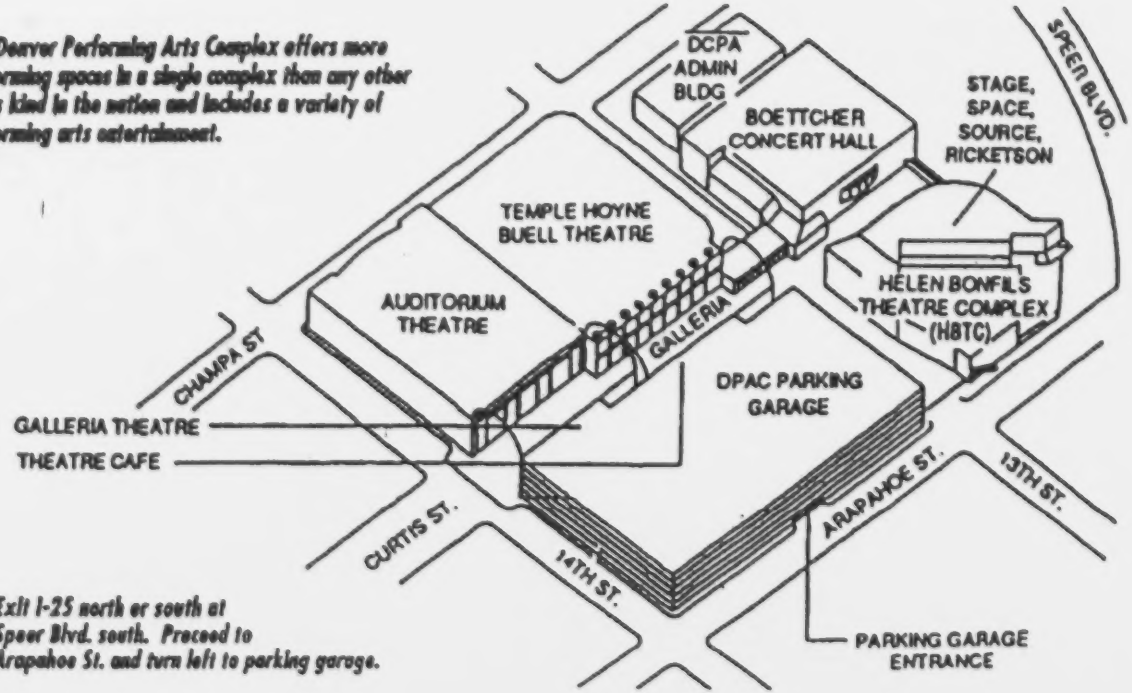
speech policy, they could have theoretically refused to permit access to the Galleria on the basis of plaintiff's viewpoint, they provide no evidence that they did so here. Instead, the evidence shows consistent application of a ban.

FN6. Because plaintiffs clearly wanted to leaflet as well as picket, we must consider these activities in combination in this "as applied" challenge. Thus, we express no opinion regarding plaintiffs' First Amendment rights had they wished solely to picket in the Galleria.

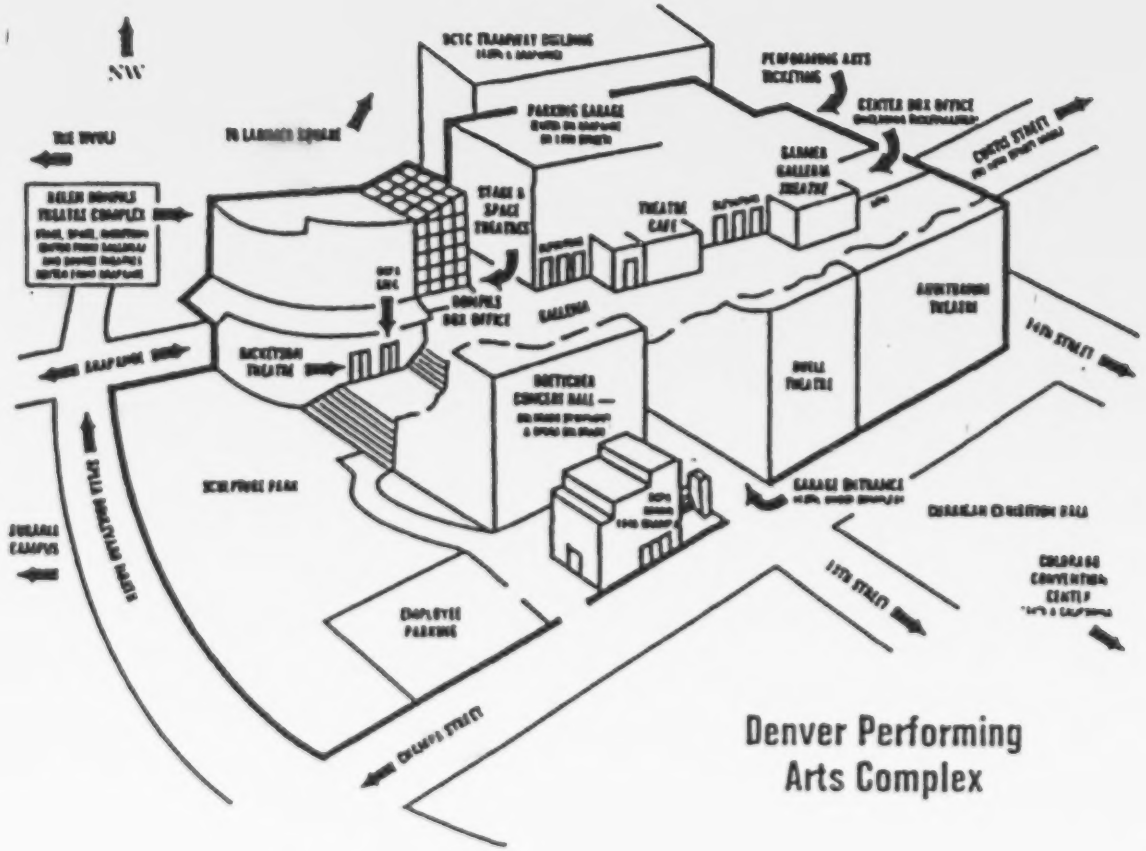
FN7. Although we are not required to make such a finding, our conclusion regarding the reasonableness of Denver's DPAC speech restrictions as applied to the plaintiffs is bolstered by the fact that ample alternative channels for communication remain available to plaintiffs. Plaintiffs were free to demonstrate on the public sidewalks surrounding the DPAC. Up to 40 or 50 percent of DPAC patrons enter the DPAC via these sidewalks. Furthermore, plaintiffs could have used signs readable by passing motorists as they entered the DPAC garage. Thus, plaintiffs could have, by alternative means, reached a large portion of the DPAC patrons. The fact that using the Galleria was the most efficient means of disseminating their message did not entitle them to access. See *Cornelius*, 473 U.S. at 809 ("The First Amendment does not demand unrestricted access to a nonpublic forum merely because use of that forum may be the most efficient means of delivering the speaker's message.").

Denver Performing Arts Complex Maps

The Denver Performing Arts Complex offers more performing spaces in a single complex than any other of its kind in the nation and includes a variety of performing arts entertainment.



Exit I-25 north or south at Speer Blvd. south. Proceed to Arapahoe St. and turn left to parking garage.



Denver Performing Arts Complex

APPENDIX A 2 – JUDGMENT OF UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 97-S-2474

JACK HOWAKINS, individually and as President of the DENVER AREA LABOR FEDERATION, and PETE VRIESENGA, individually and as President of the DENVER MUSICIANS ASSOCIATION,

Plaintiffs,

vs.

CITY AND COUNTY OF DENVER, GARY LANE, Director of the DENVER THEATERS AND AREANS, BROOK NICHOLS, Assistant Building Manager of the DENVER THEATERS AND AREANS, and DAVID MICHAUD, as CHIEF OF THE DENVER POLICE DEPARTMENT,

Defendants.

JUDGMENT

This matter came on for hearing on December 3, 1997 before the Honorable Daniel B. Sparr, Judge presiding. The court made oral findings of fact and conclusions of law incorporated herein by reference. It is, therefore,

ORDERED that Plaintiffs' request fro injunctive relief is denied. It is

FURTHER ORDERED that judgment is entered in favor of the defendants and against the Plaintiffs. It is

FURTHER ORDERED that this civil action and complaint are dismissed.

FURTHER ORDERED that the Defendants shall have their costs upon the filing of a Bill of Costs with the Clerk of the Court within 10 days of entry of this judgment.

DATED at Denver, Colorado, this 4th day of December, 1997.

FOR THE COURT:
JAMES R. MANSPEAKER, CLERK

_____

By: Stephen P. Ehrlich
Chief Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

No. 97-S-2474

JACK HAWKINS, et al.,
Plaintiffs,

vs.

CITY AND COUNTY OF DENVER, et al.,
Defendants.

REPORTER'S TRANSCRIPT
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Proceedings before the HONORABLE DANIEL B. SPARR,
Judge, United States District Court for the District of Colorado, commencing at 10:30 a.m., on the 3rd day of December, 1997, in Courtroom C-501, United States Courthouse
Denver, Colorado.

APPEARANCES

FOR THE PLAINTIFFS: NEIL D. O'TOOLE, ESQ.
226 West Twelfth Avenue
Denver, CO 80204-3625

For The DEFENDANTS: STAN M. SHAROFF, ESQ.
1445 Cleveland Place, #302
Denver, CO 80202

GWEN DANIEL, Official Reporter
Drawer 3572 - 1929 Stout Street
Denver, Colorado 80294
(303) 571-4084

Proceedings Reported by Mechanical Stenography
Transcription Produced via Computer

Ruling

THE COURT: All right. The matter comes before the Court on a motion for preliminary injunction, which was filed in this matter in the form of a Verified Complaint requesting preliminary and permanent injunction on November 24th.

The defendants have filed a response to the request

for preliminary injunction, which has also been received and reviewed by the Court, that filed on December the 2nd.

The facts are pretty straightforward. The plaintiff seeks a preliminary injunction against the city refusing to allow the distribution of certain handbills by the plaintiffs with respect to a dispute between the Colorado Ballet and the union musicians concerning the use of taped music as opposed to live musicians in the performances of the Colorado Ballet.

The facts are fairly simple. On October 11th, a demonstration was held after a dispute between the two

principals, the Colorado Ballet and the musicians, at which handbills were passed out in the Galleria.

It's appropriate to determine that the Galleria area as referred to here is an enclosed area lying between the DCPA parking garage -- DPAC, I guess it is, Denver Performing Arts Complex parking garage structure and the Auditorium Theatre, the Temple Buell Theatre, bounded on other sides by the Helen Bonfils Theatre Complex and the Boettcher Concert Hall.

The Galleria has an entrance onto 14th Street, a public right of way, bounding it on the one side, and the Speer Boulevard and the Speer Boulevard Park bounding it on the other side.

The Galleria serves as an area to accommodate the visitors to the various venues in the Denver Performing Arts Complex.

(92)

The handbills were passed out on the first occasion

as indicated by the exhibits. On the second occasion, at the end of that occasion, they were apparently advised by the police, the Denver Police Department, that if they wished to have further demonstrations and passing out of handbills, that they should not do it in the Galleria area.

On October 12th, the next night, they passed out handbills, limiting their activities to the entrances adjoining the Galleria area, apparently on the parking garage structure adjoining the Galleria area across from the Auditorium Theatre and the Temple Buell Theatre. There was another occasion on which this procedure was utilized. Again, the police advised them that they should not be in this area either. They were asked to confine their activities to the public sidewalks and the general entrance area around the 14th Street -- 14th and Curtis Street entrance and to the sidewalks surrounding the Denver Performing Arts Center. Final demonstrations were held in the garage area, and again they

were refused -- refused access and ordered to the public sidewalks.

The Denver city and county has held this area. It appears to be the property of the City and County of Denver. The property is leased to different venues based upon the lease agreements between the city and the venues. There are several commercial enterprises in the Galleria area, including

(93)

a restaurant. Apparently there is adjoining the Galleria area, which does not directly abutt the Galleria, but is a part of the Denver Performing Arts Complex and a business known as Screen to Screen. The parking garage is obviously also a part of the Galleria. There is apparently a Galleria bar and a restaurant which are adjoining the Galleria and are also lessees to the Performing Arts Center.

Early in the game when the city was first developing this area, it was determined based on the problems that were anticipated that the city would follow a policy of restricting

any activities in the Galleria area to activities specifically promoting or a part of the use of the respective venues.

Because this area serves as an area which must accommodate substantial numbers of people, the area, according to the testimony, is approximately 32 to 40 feet wide and approximately 600 feet long. The crowds in the areas during events and preceding and following events, during intermissions, and so forth, is extremely packed, to use a word, as evidenced by the several different exhibits. It's also noted that the area is also used for lines awaiting entrance into the respective venues preceding performances. It's used as a smoking area for the venues, which are all nonsmoking venues. And it is also considered to be the fire lane or fire exit of all the venues in the event of some kind of an emergency. It is the only access or egress to the

(94)

venues. And it in substance is described by the witnesses as an extension of the respective venues and a specific part of the complex.

The only handouts that have been allowed, as I indicated, are informational and promotional materials involving events and involving the venues.

In the past it has been decided by the city to implement a policy restricting the use of the venues for any purpose other than that indicated.

The respective venues contain approximately 9300 seats, although they are not at all times all in use, and I imagine very seldom all in use. However, there are very often many, many seats in use far exceeding the capacity of the parking garage, which has only 1600 spaces. And at many times, according to the testimony, as many as 40 to 60 percent of the customers or individuals using the venues are coming from the outside of the venues through the 14th Street entrance or through other entrances.

The basic reasons behind the city's policy of not allowing any handbilling or other demonstration activities in the Galleria area is basically two-fold. The first is the

22 interest in public safety. The public safety is served by not

23 allowing anything which might restrict the entrance access and

24 egress to the venues in the event of emergencies. And also it

25 was decided to restrict the area because of the possibilities

(95)

1 of problems from many different sources. The several

2 mentioned were the fact that there would be -- if this were

3 determined to be a public area, there would be homeless

4 individuals or street people, I would assume, who would elect

5 to use that area; there would be vendors of all types and

6 descriptions who have a right in a public place to vend their

7 wares; individuals such as one sees on our 16th Street Mall

8 for handouts; speeches being given by different individuals

9 espousing their particular positions, all of which would

10 clearly in the city's opinion at the time disrupt the use of

11 the venues by the lessees and their patrons, individuals who

12 are there for their entertainment, and otherwise. At this

13 time it was determined that the only handouts that would be

14 allowed were those earlier discussed.

Since that time the city has uniformly enforced its policy against any handbilling or other public demonstrations as indicated. Several examples which were quoted by one of the witnesses were the fact that it was attempted to use the public forum on one occasion by an anti-abortion group, and the policy was enforced as to their views. They were asked to leave the venue area, the Galleria -- the Galleria area of the venues and remain on the public sidewalk.

Also when the republicans and the democrats attempted to use posters or place some kind of demonstration materials in the Galleria, they were asked to -- were restricted from

(96)

doing so. Although they did -- were allowed to place these posters in the particular venue which they had engaged for their activities, which is permitted in any case.

They even precluded an individual from handing out free roses to patrons in the Galleria area under their policy.

The policy is straightforward, stating that the

posting of handbills, fliers, notices, propaganda are not allowed in parking areas or private property without the express consent of the manager. Demonstrations, speeches or other acts creating or intending to attract public forum are prohibited within the boundaries of the private property line. Public forum activity is allowed on the designated public right of ways immediately adjacent to the property. Parking must occur in the designated parking spaces, parking fees must be paid, sales of tickets, food, T shirts, novelties and other items without express permission are strictly prohibited.

The regulations are in this Court's opinion clearly content-neutral.

After the demonstrations in question this matter was filed, the plaintiff alleging that this is in fact a public forum and that the defendants by their restriction on the use of the area by the union for -- or the musicians for their purposes is a violation of their rights to freedom of expression. Thus, they seek this injunction.

The standard for a preliminary injunction, which is

an extraordinary remedy, and is the exception rather than the rule, is set forth clearly by the case law. See GTE Corporation vs. Williams, 731 F.2d 676 at 678 (10th Cir. 1984), and other cases.

Preliminary injunction cases are legion. The burden of proof in obtaining a preliminary injunction is set forth in SCFC ILC, Incorporated vs. Visa USA, Incorporated, found at 936 F.2d 1096, where Judge Ebel indicated, "In order to obtain a preliminary injunction, the moving party must establish: (1) a substantial likelihood that the movant will eventually prevail on the merits; (2) a showing that the movant will suffer irreparable injury unless the injunction issues; (3) proof that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) a showing that the injunction if issued would

not be adverse to public interest. Quoting Otero Savings & Loan, 655 F.2d 275 at 278 (10th Cir. 1981).

A preliminary injunction is extraordinary as set forth in GTE Corp vs. Williams supra. The right to relief must be clear and unequivocal. It's frequently observed that a preliminary injunction is extraordinary and drastic, one that should not be granted unless the movant by a clear and convincing showing carries the burden of persuasion.

In Lundgrin, L-U-N-D-G-R-I-N, vs. Claytor, C-L-A-Y-T-O-R, 619 F.2d 61 (10th Cir.), Judge Seymour speaking

(98)

for the Court, states, "The function of a preliminary injunction is to preserve the status quo pending a final determination of the rights of the parties."

Quoting Penn vs. San Juan Hospital, 528 F.2d 1181 (10th Cir. 1975), "The granting or denying of preliminary injunctions are within the sound discretion of the trial court. In defining what a movant must show to support the grant of a preliminary injunction, the Court has held in

hearings upon motions for temporary or preliminary injunctive relief the burden is upon the one requesting such relief to make a prima facie case showing a reasonable probability that he will ultimately be entitled to the relief sought. The applicant has the additional burden of showing the right to specific injunctive relief sought because of irreparable injury that will result if the injunction is not granted. There must exist a probable right and a probable danger." I quote that with emphasis. Judge Seymour then sets forth the standards for the granting of a preliminary injunction. Accordingly, it is the plaintiffs' burden here to prove the issues.

"In analyzing any government imposed restriction of speech, the first inquiry must be the nature of the property which is affected by the regulation," quoting Hague vs. Community – Committee for Industrial Organization, 307 U.S.

496 (1939) and Perry Education Association vs. Perry Local Educators, 460 U.S. 37 at 44.

(99)

The existence of the right of access to public property and the standard by which limitations upon such rights must be evaluated differ specifically based upon the nature of the use of the property. The cases have clearly pointed out the determination of such use is a prerequisite to the determination of the appropriateness of restriction of speech.

In United States vs. Mary T. Grace, the Supreme Court of the United States, at 461 U.S. 171, 103 Supreme Court 1702 at page 174 -- strike that, at page 1707, the Supreme Court Reporter, page 177 of the U.S. Reporter, stated, "It is also true that public places historically associated with the free exercise of expressive activities, such as streets, sidewalks and parks are considered, without more, a public forum." Thus, defining public forums and public property. "In such places the government's ability to permissibly restrict

expressive conduct is very limited. The government may enforce reasonable time, place and manner of regulations as long as the restrictions are content-neutral and narrowly tailored to serve significant government interests and leave open ample alternative channels of communication." I'll omit the citations for both propositions.

"Additional restrictions such as an absolute prohibition on the particular type of expression will be

upheld only if narrowly drawn to accomplish a compelling governmental interest." But publicly owned property does not necessarily become a public forum nor does publicly operated property, simply because members of the public are permitted to come and go at will.

That is the case here. The Galleria is open to the public 24 hours a day unless on certain occasions it is closed; however, it is merely an area where the public is allowed access at will. Whether the property is generally

open to the public is a factor to consider in determining whether the government has opened its property to the use of the public for communicative purposes, but is not determinative of the question.

The Court has stated that it regularly rejects the assertion that people who wish to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please.

The Court continues, "There's little doubt that in some circumstances the government may ban the entry onto public property that is not a public forum of all persons except those who have legitimate business on the premises. The government, no less than a private owner of property, has the power to preserve the property under its control for the use to which it is lawfully dedicated." .

In this case, the argument in the Grace case was

about the Supreme Court grounds, and the Court defined the

Supreme Court Building and its grounds as fitting neatly into the description of a nonpublic forum property. "Although the property is publicly owned, it has not been traditionally held open for the use of the public for expressive activities," quoting *Greer v. Spock*, citation omitted. "It is not transformed into a public property merely because the public is permitted to freely enter or leave the grounds at practically all times and the public is admitted to the building during specific hours."

"Under this view it would be necessary only to determine that the restrictions imposed by the regulations were reasonable in light of the use to which the building and grounds were dedicated and there was no discrimination on the basis of content."

What the Supreme Court is here holding is that a piece of public property is not necessarily transformed into a public forum merely by its use.

Sidewalks have for all purposes generally been held to be public forums and are treated as such by the First

Amendment.

In the Perry case the Court narrowed it a bit more by saying there are three basic types of property - traditional public forums, such as sidewalks, parks and the like, which as I've indicated have as their principal purpose the free

(102)

exchange of ideas; secondly, designated public forums where the government dictates the communicative use of the property;

and, finally, remaining public property.

In that case they held that the government could impose reasonable regulations on the time, place and manner of speech providing the restrictions are justified without reference to the content of the speech and are narrowly tailored to serve the government interests and leave open alternative channels for communication of information.

In the nonpublic forum, the government may reserve the forum for its intended purposes, as long as regulations

are reasonable and do not -- are not an effort to suppress expression merely because of public officials' opposition to such views.

In this case, it appears to the Court that the Galleria area is clearly the property of the City and County of Denver. It is not a public forum. It is, if anything, a designated public forum, but more probably a remaining public property dedicated to a specific use. And, accordingly, the doctrines of the First Amendment with respect to the traditional public forum, again such as sidewalks, streets and the like, and parks, does not here apply.

Looking to the restrictions in question, it appears, as the Court has indicated, that none are -- that all restrictions are content-neutral. Noting the defendants -- or

the plaintiffs' own exhibits, the magazine Denver Venues, Exhibit No. 15, which is devoted solely in the Court's examination to the promotion of public activities -- or of

activities within the public forum within the venues of the city. The examples are the Denver Performing Arts Complex schedule, which is the heart of the magazine, setting forth the schedule of events at all the -- at the Boettcher Concert Hall, the Helen Bonfils Theatre. It appears it also sets forth events at other Denver venues.

Other parts of the newspaper contain some advertisements, but with almost no exception the advertisements advertise matters which are being a part of the Denver venue, such as the Denver Broncos games at the Mile High Stadium, a Denver venue; the Salute to Vienna Straus Symphony at the Boettcher Concert Hall; the Harlem Globetrotters at the Denver Coliseum; the Explosion at another Denver venue; the Denver Coliseum show, and specifically other events to be held at the Denver venue.

The other exhibits by the plaintiff clearly indicate that they are advertisements for individual venues where rent

is paid and leases are -- have been established, and they are promotions of the venues, such as the Galleria Ball, the Screen to Screen, and the other examples.

The question is raised by the use of the Galleria area for the parking of a small pickup truck to advertise the

John Elway dealerships. It's indicated that this is a matter which was apparently discussed with the -- a lease was obtained and it was discussed with the Denver Performing Arts people, and they authorized this, and it was bought and paid for. It is not, again, a matter of public expression.

As to the requirements, the Court concludes that the reasonable -- the restrictions here, as I've indicated, are reasonable. They serve a general and legitimate public purpose; mainly, the public safety and allowing the venue to be clear for the activities for which it is designed and for which it is dedicated. They are without reference to content in this case and are narrowly tailored to serve the interests

of the government in promoting the respective venues in the Denver Performing Arts Complex and other city venues within the purview of the Denver Theatres and Arenas.

Accordingly, the Court concludes that the request for injunction must be denied, and unless there's some other request for relief, the matter be dismissed. Anything further?

APPENDIX B – ORDER DENYING REHEARING

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JACK HAWKINS, individually and as President of the Denver Area Labor Federation and PETE VRIESENGA, Individually and as President of Denver Musicians Association,

Plaintiffs-Appellants,

v. No. 98-1003

CITY AND COUNTY OF DENVER, GARY LANE, Director of the Denver Theaters and Arenas, BROOK NICHOLS, Assistant Building Manager of the Denver Theaters and Arenas and DAVID MICHAUD, as Chief of the Denver Police Department,

Defendants-Appellees.

ORDER
Filed April 6, 1999

Before **TACHA, BARRETT** and **HENRY,** Circuit Judges.

Appellants' petition for rehearing is denied.

Entered for the Court
PATRICK FISHER, Clerk of the Court
By: Deputy clerk

APPENDIX C – CONSTITUTION PROVISION AND DENVER REGULATIONS

CONSTITUTIONAL/ORDINANCE PROVISIONS:

C. U.S. Constitution

Amendment I

Freedom of religion, speech, and press – right of petition. Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for redress of grievances.

Appendix C.

D. Municipal Regulations/City & County of Denver Policy and Procedures

Private Property and The Use Thereof

All facilities managed by the Division of Theaters and Arenas are owned by the City & County of Denver and considered "private porperty." Specifically, these facilities are McNichols sports Arena, Red Rocks Amphitheatre, the Denver coliseum, Colorado Convention Center, Currigan Hall, Boettcher Concert Hall, the Temple Hoyne buell Theatre, and the Auditorium Theatre.

Theatres & Arenas rents the facilities mentioned above to various tenants. This arrangement is made by a rental agreement, a legal document. As such, any activities that occur inside and outside of the leased premises are regulated.

Because these facilities are considered private property, it is impotant to understand that each facility has a property line as indicated on the attached map(s). All activities within the property line must conform to the applicable laws, rules, regulations, and ordinances that pertain to such premises.

Some rules that apply are:

- Posting of handbills, flyers, notices, and propaganda are not allowed in parting areas or private property without the express consent of the Facility Manager of Denver, and at times, the Tenant.
- Demonstrations, speeches, and other acts creating or intending to attract a public forum are prohibited within the boundaries of the private property line. Public forum activity is allowed on the designated public right of ways immediately adjacent to the private property lines.
- Parking must occur in designated parking spaces only. Parking fees must be paid, and parkers are subject to the terms and condition as noted on the front of the parking coupon.

Sales of tickets, foods, t-shirts, novelties, or any items without express permission of the Facility Manager is strictly prohibited.

APPENDIX D – PHOTOS

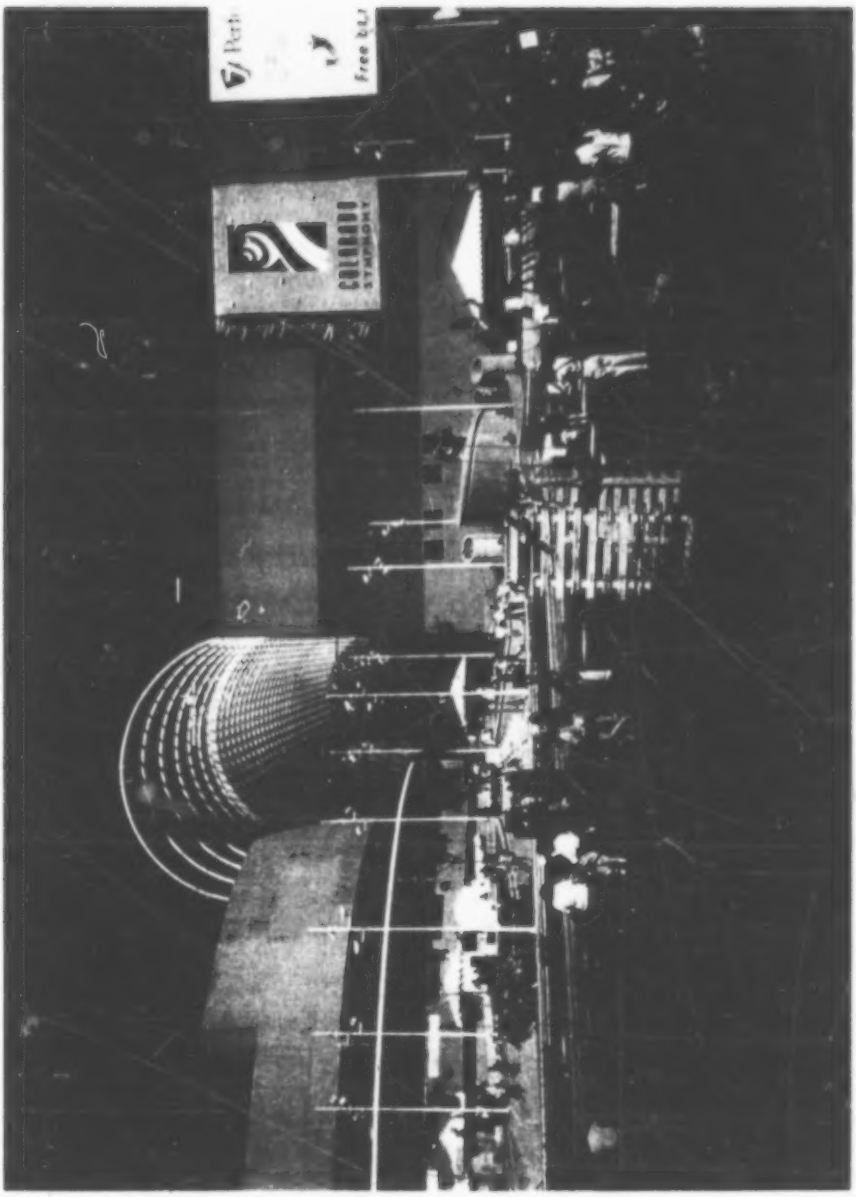
1. Photo of Leafletting by Musicians in October 1997.

2. Evening Photo of Leafletting by Musicians in October, 1997.

3. Daylight Photo of Speer Blvd. Entrance to Galleria.

4. Daylight Photo Taken Inside the Galleria in December, 1997, Showing Pedestrian Traffic.

5. Daylight Photo of the Galleria Taken in December, 1997, Showing Display of 1998 Lincoln.


COLUMBIA
SYMPHONY